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Judicial Determination of Political Party Organizational Autonomy

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JUDICIAL DETERMINATION OF POLITICAL PARTY ORGANIZATIONAL AUTONOMY

SOME RECENT DEVELOPMENTS IN THE LAW OF PARTIES (1936-1957)

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Of all the various governmental and political institutions prominently associated with democracy, political parties have perhaps had the greatest difficulty in securing acceptance as necessary and proper instrumentalities for responsible popular government. The bias against political parties has run deeply. George Washington reflected a widely held view of this[1] when he warned his fellow citizens that the spirit of party "serves always to distract the public councils and enfeeble the public administration. It agitates the country with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion."[2]

Despite the rapid and significant growth of political parties—largely an outgrowth of the mass suffrage of the Jacksonian era—their relationship to governmental policy-making, administrative personnel, and accountability was assiduously ignored. This was true in even the most learned of commentaries on the American governmental system until Bryce published his *American Commonwealth*.[3]

In the years following the Civil War, the ever increasing power of political parties in a climate of rapid industrialization, urbanization and immigration demanded the attention of reformers and Muckrakers who had declared war on party bosses, political machines and governmental corruption. The cure was to be found in greater intra-party democracy and increased popular participation in the nomination process. Between 1875 and 1915, state after state sought to purify parties and elections with the aid of the direct primary, the Australian Ballot, and anti-corrupt practices legislation.[4] In the name of better government and more honest politics the one time common law autonomy of political parties as non-

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1. See Ranney and Kendall, Democracy and the American Party System 127 (1956).
2. A Compilation of the Messages and Papers of the Presidents 211 (Vol. I) (Richardson ed. 1897).
3. Bryce, The American Commonwealth (1888).
4. See Sait, American Parties and Elections 287-93 (2d ed. 1952).

profit, unincorporated, voluntary associations was compromised by interventions based on statutory authority and administrative discretion.

That the direct primary alone must assume much responsibility for limiting party self-government, and thus contribute to the atrophy of party organization, is an hypothesis strongly supported by many American political scientists.[5] These studies emphasize that political parties, or rather *responsible* political parties, cannot be expected to perform their manifold functions of educating the voters, initiating public policy, offering competition to other parties, attracting capable candidates and, most significantly, holding government accountable to the electorate, if they as party organizations are prevented from building tickets with candidates committed to the party's program and platform.

Central to the effective performance of these various roles at least on the state level is, of course, the hierarchy of state committees and conventions. In this paper an effort is made to discern the present legal status and powers of such committees, and to note the extent of their legal atrophy or impotence as it emerges from various judicial determinations of intra-party disputes, contests for party nomination, and from the interpretations of party statutes.

I. *Finality of Committee Actions and Financial Powers*

In the highly decentralized structure of the American political party system the locus of ultimate organizational power remains in the state party convention. The legal status and powers of such a political convention were in issue in a recent case decided by the Minnesota Supreme Court.[6] If properly called under applicable statute, such convention was held to be (1) the exclusive judge of the election and qualifications of its members; (2) competent to transact floor business legally despite the fact that its quorum may be short of a majority of those entitled to participate; and (3) to remain unaffected by the withdrawal from the convention of either a majority or minority of the delegates.[7] This case is illustrative of a number of recent judicial decisions[8] reaffirming party autonomy,

5. See, *e.g.*, Key, American State Politics (1956); *Toward a More Responsible Party System*, 44 Am. Pol. Sci. Rev. 71. (Supp. 1950); National Municipal League, A Model Direct Primary (1951).

6. Democratic-Farmer-Labor State Central Comm. v. Holm, 227 Minn. 52, 33 N.W.2d 831 (1948).

7. *Id.* at 55-56, 33 N.W.2d at 833.

8. *Arkansas:* Park v. Kincannon, 214 Ark. 398, 216 S.W.2d 376 (1949) (in the absence of statute, court is without jurisdiction to entertain an election contest between rival candidates for township committeeman).

Florida: Alexander v. Booth, 56 So.2d 716 (Fla. 1952) (in the absence

and particularly reaffirming the finality of party decisions in matters of intra-party disputes.

In their determination of the legal status of party officers elected on a direct primary ballot, the courts have continued the use of three major approaches. For example, the Louisiana Supreme Court has held that a member of the State Central Committee of a political party is not only a public officer, but also a state officer because "he is a member of a State body whose functions and duties are of a state-wide nature."[9] On the other hand, the Texas Supreme Court rejects the concept of a party office being a public office, even where such a position is provided with a specific statutory definition and authority.[10] *Morris v. Peters*,[11] a recent case from the Georgia courts, illustrates an attempt to avoid this "public" versus "private" office controversy by holding that ". . . when the law imposes duties [on a political party officer], it also confers a right and the law will afford protection in the performance of such duties."[12]

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of statute to the contrary, national committeemen and delegates to the national conventions are to be selected according to the customs and practices of the party).

Kentucky: O'Neil v. O'Connell, 300 Ky. 707, 189 S.W.2d 965 (1945) (intra-party disputes are to be settled by the party governing authorities).

Minnesota: Democratic-Farmer-Labor State Central Comm. v. Holm, 227 Minn. 52, 33 N.W.2d 831 (1948) (the court will not assume jurisdiction in factional controversies within a party where there is no controlling statute).

Ohio: State *ex rel.* Pfeifer v. Stoneking, 80 Ohio App. 70, 74 N.E.2d 759 (1946) (in the absence of statute, a political party central committee may authorize the complete delegation of its power to its executive committee and make rules for its own organization and conduct of business).

Pennsylvania: Commonwealth *ex rel.* Koontz v. Dunkle, 355 Pa. 493, 50 A.2d 496 (1947) (rejected quo warranto as a method of determining the legal status of a political party county chairman).

Texas: Runyon v. Kent, 239 S.W.2d 909 (Tex. Civ. App. 1951) (courts have no power to interfere in matters involving party government to determine disputes as to regularities of elections).

9. State *ex rel.* Tuttle v. Republican State Central Comm., 192 So. 740, 743 (La. App. 1939). See Doyle v. Rapides Parish Democratic Executive Comm., 32 So.2d 494 (La. App. 1947). *But see* Poole v. Merritt, 19 So.2d 461 (La. App. 1944); Noonan v. Walsh, 364 Mo. 1169, 273 S.W.2d 195 (1954).

10. Carter v. Tomlinson, 149 Tex. 7, 227 S.W.2d 795 (1950) (although their positions may be covered by statute, committees of any political party in acting for the party's interests are not acting as officers of the state). See also Kidder v. Mayor of Cambridge, 304 Mass. 491, 24 N.E.2d 151 (1939); Currie v. Wall, 211 S.W.2d 964 (Tex. Civ. App. 1948), *rev'd*, 147 Tex. 127, 213 S.W.2d 816 (1948).

11. 203 Ga. 350, 46 S.E.2d 729 (1948).

12. *Id.* at 361, 46 S.E.2d at 736. See Terry v. Adams, 345 U.S. 461 (1953); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949). See also Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948), where party officials were considered by the court to be *de facto* officers of the state. This, of course, constituted an important element in the attack upon electoral discrimination against Negroes.

Whether or not a legislature may confer upon party officers the statutory power to make nominations and legally bind the appointing authority to accept such nominations has also been the subject of legal controversy. In an explicit reversal of an earlier decision,[13] the Indiana Supreme Court considered such a grant of power to be a proper exercise of the state's police power.[14] Reasoning that political parties may be considered to act as state agencies with a peculiar interest in the honest administration of elections, the court maintained that the interests of a strong two party system would be better served if the county board of election were to be composed by the choice of the two major parties.[15]

In a number of cases the finality of actions and decisions taken in the absence of specific statutory authority by political party committees were sustained where such a committee wished to accomplish the following: impose some "reasonable qualifications" for its nominees;[16] "endorse," even if it contravened its own rules;[17] settle by itself a contest for chairman where the public election machinery was not involved;[18] develop its own rule of geographic representation;[19] authorize its chairman to change the time of holding county, district, and state conventions;[20] rescind a selection of nominees once made pursuant to statute (but before the official ballot was made up) for any reason that the majority of the committee so deciding may consider to be in the best interest of the party;[21] or permit its county executive committee on basis of custom to accept the right of voting by proxy if there is nothing in either statute or party rules to prohibit it.[22]

13. Harrell v. Sullivan, 220 Ind. 108, 40 N.E.2d 115 (1942).

14. State *ex rel.* Buttz v. Marion Circuit Court, 225 Ind. 7, 72 N.E.2d 225 (1947). *Accord:* Mills v. Gaynor, 136 Conn. 632, 73 A.2d 823 (1950); Russel v. Rhea, 269 Ky. 138, 106 S.W.2d 148 (1937); Driscoll v. Sakin, 121 N.J.L. 225, 1 A.2d 881 (1938). But this view was rejected in State *ex rel.* James v. Schorr, 45 Del. 18, 65 A.2d 810 (1948), and Preisler v. Calcaterra, 362 Mo. 662, 243 S.W.2d 62 (1951), on the grounds of violating equal protection of federal and state constitutions where the statute provided that only the two dominant political parties could be given the "right" or "privilege" of keeping watchers and challengers at the polls.

15. State *ex rel.* Buttz v. Marion Circuit Court, 225 Ind. 7, 20, 72 N.E.2d 225, 231 (1947).

16. Yuratich v. Plaquemines Parish Democratic Executive Comm., 32 So.2d 647 (La. App. 1947).

17. Rosenberg v. Republican Party, 270 S.W.2d 171 (Ky. App. 1954).

18. Commonwealth *ex rel.* Koontz v. Dunkle, 355 Pa. 493, 50 A.2d 476 (1947).

19. Holland v. Taylor, 153 Tex. 433, 270 S.W.2d 219 (1954).

20. Holmes v. Holm, 217 Minn. 264, 14 N.W.2d 312 (1944).

21. Long v. Martin, 194 La. 797, 194 So. 896 (1940). See also Browne v. Martin, 19 So.2d 421 (La. App. 1944).

22. State *ex rel.* Bullard v. County Court, 92 S.E.2d 452 (W.Va. App. 1956). *But see* Hart v. Sheridan, 168 Misc. 386, 390, 5 N.Y.S.2d 820, 824

When, however, in the absence of specific statutory authority a committee granted to its chairman the power to submit a list of nominees for the office of election commissioner, it was held to be an unauthorized sub-delegation of authority.[23] The appointing authority was granted the power by this court to "go behind the certificate" of nomination and see if the nominees actually reflected the action of the committee as a body as required by statute.[24]

In New York, the judiciary has extensive statutory power to determine the legal status of committees and the validity of their actions.[25] On the basis of such power, the courts of that state have questioned the finality of political committee action when the committees' proceedings were so irregular as to preclude an orderly determination of policy, and where a chairman attempted to declare an adjournment without the assembly's approval;[26] where notices announcing the party meeting were not sent out in proper time as provided in the party's own rules;[27] and where a subsequently legally convened committee wished to ratify and make valid the invalid actions of its predecessor.[28]

A statute empowering the county committee "in every city and county" to increase its own membership by a majority vote[29] was

(Sup. Ct. 1938) ("I think it quite well settled that there is no common law right of voting by proxy. . ."); O'Brien v. Fuller, 93 N.H. 221, 228, 39 A.2d 220, 224 (1944) (statutory language that delegates "shall elect" was construed as legislative intent to preclude use of proxy voting).

23. State *ex rel.* Robertson v. County Court, 131 W.Va. 521, 48 S.E.2d 345 (1948).

24. *Id.* at 527, 48 S.E.2d at 349.

25. N.Y. Election Law § 330 (1949). Summary Jurisdictions: "The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any of the subjects set forth in this section, which shall be construed liberally. Such proceedings may be instituted as a matter of right and the supreme court shall make such order as justice may require. . . .

"(2) The nomination of any candidate, or his election to any party position, in a proceeding instituted by any candidate aggrieved or by the chairman of any committee as defined . . . and the court may direct a re-assembling of any convention or the holding of a new primary election where a convention or primary election has been characterized by such frauds or irregularities as to render impossible a determination as to who rightfully was nominated or elected. . . ."

26. McDonald v. Heffernan, 196 Misc. 465, 92 N.Y.S.2d 382 (Sup. Ct. 1949), *aff'd*, 275 App. Div. 1054, 92 N.Y.S.2d 426 (1949).

27. Jones v. Malone, 200 Misc. 88, 101 N.Y.S.2d 895 (Sup. Ct. 1950). See also Bannigan v. Heffernan, 280 App. Div. 891, 115 N.Y.S.2d 444 (Sup. Ct. 1952), *aff'd*, 304 N.Y. 729, 108 N.E.2d 209 (1952).

28. Connolly v. Cohen, 173 Misc. 288, 17 N.Y.S.2d 891 (Sup. Ct. 1939). See also Broderick v. Knott, 197 Misc. 114, 94 N.Y.S.2d 43 (Sup. Ct. 1949); Application of Branch, 277 App. Div. 1018, 99 N.Y.S.2d 948 (1950); Bannigan v. Heffernan, 115 N.Y.S.2d 889 (Sup. Ct. 1952), *order modified*, 280 App. Div. 891, 115 N.Y.S.2d 444, *aff'd*, 304 N.Y. 729, 108 N.E.2d 209 (1952).

29. Cal. Elections Code § 2833 (1955).

attacked successfully in the Supreme Court of California on the ground that it represented "local special legislation."[30] The court held this to constitute "an unreasoned basis for classification in view of the fact that there was in reality only one 'city and county,' namely San Francisco."[31]

The finality of party committee decisions were also challenged in various jurisdictions when it was found that their actions, under applicable statutes, were of a "judicial" rather than of a mere "ministerial" character,[32] and where it was determined that its judgments rested on an insufficient basis of fact.[33] Where the parties were authorized by statute to make nominations, one court sustained a challenge to such a nomination on the ground that the committee so empowered had itself not been properly elected, and that higher party committees were in such a case without power to fill a vacancy on the ballot.[34]

The doctrine of judicial non-intervention into the affairs of political party committees was held to be an inapplicable defense when property rights were involved in another interesting recent case.[35] A member of such a political committee was deemed to have a right of perpetuating testimony in an accounting proceeding against other members of the committee for their allegedly illegal handling of committee funds. The court considered such moneys to be public funds in the hands of public officers.[36]

Under the provisions of the Texas code of elections, county committees of political parties are given the power to estimate the administrative costs of printing the official primary ballots and to allocate on a "just and equitable" basis the expenses for districts, county and precinct offices among the candidates seeking nominations for such positions.[37] The Texas courts have held that these

30. Stout v. Democratic County Central Comm., 40 Cal.2d 91, 251 P.2d 321 (1953).

31. *Id.* at 94-96, 251 P.2d at 322-23.

32. Allen v. Republican State Central Comm., 57 So.2d 248 (La. App. 1952); Higgins v. Barnhill, 218 Ark. 466, 236 S.W.2d 1011 (1951); Carroll v. Schneider, 211 Ark. 538, 201 S.W.2d 221 (1947); Irby v. Barrett, 204 Ark. 682, 163 S.W.2d 512 (1942); Tanner v. Duncan, 10 So.2d 507 (La. App. 1942).

33. Prather v. Ray, 258 Ala. 106, 61 So.2d 46 (1952).

34. O'Brien v. Fuller, 93 N.H. 221, 39 A.2d 220 (1944). A somewhat different conclusion was reached by a Kentucky court where the State Central Committee "as superior governing authority of the party" was acknowledged upon the deadlock in a district committee nomination dispute to have the power to act in that committee's place. This power was considered to be implicit in the whole body of party law. See O'Neil v. O'Connell, 300 Ky. 707, 189 S.W.2d 965 (1945).

35. Malone v. Superior Court, 249 P.2d 324 (Cal. App. 1952), *aff'd*, 40 Cal.2d 546, 254 P.2d 517 (1953).

36. Malone v. Superior Court, 249 P.2d 324, 328 (Cal. App. 1952).

37. Tex. Election Code Ann. § 13.08 (Supp. 1956).

funds represent a "trust" which is to be strictly interpreted in order to prevent disbursements for such items as committee salaries, or any other items not specifically stipulated by statute.[38] This statute has been construed as prohibiting county committees from amending their rules in such a manner as to enable the committee to require a twenty-five per cent contribution of all such fees to cover administrative expenses.[39] Following such strict statutory construction, the Texas court in *Stevenson v. Sherman,*[40] rejected as chargeable to the candidates of the preceding election such items as reimbursements of a county chairman for certain services rendered, and purchases of certain committee furniture, even if made in accord with "usage and custom" and approved by the party's executive committee. The chairman and the secretary-treasurer were to be held personally liable for expenditures not directly attributable to the particular primary.[41]

However, in the absence of such statutes, it is a well established principle of party law that before members of a political committee can be personally held liable, the legal relationship of agency must be made out explicitly; it cannot be implied from the mere fact of association.[42] Moreover, it must also be shown that the members of a committee personally authorized or ratified[43] such transactions before contractual liability may be imposed. Even if it were demonstrated that the treasurer of a particular political committee had personal knowledge of the order of certain campaign literature, it has been held that this alone would not constitute an adequate basis

38. See, *e.g.,* Small v. Parker, 119 S.W.2d 609 (Tex. Civ. App. 1938); Kauffman v. Parker, 99 S.W.2d 1074 (Tex. Civ. App. 1936); Lane v. Sanders, 95 S.W.2d 1327 (Tex. Civ. App. 1936).

39. See Kauffman v. Parker, *supra* note 38.

40. 231 S.W.2d 506 (Tex. Civ. App. 1950).

41. *Id.* at 513.

42. *E.g.,* Daniel v. Gregg, 97 N.H. 452, 91 A.2d 461 (1952); Veal v. Thompson, 287 Ky. 742, 155 S.W.2d 214 (1941); Bell Telephone Co. v. Pinchot, 44 Pa. D. & C. 119 (Dist. Ct. 1941); Kommers v. Palagi, 111 Mont. 293, 108 P.2d 208 (1940); *In re* Kearney, 136 Pa. 78, 7 A.2d 159 (1939). See also Mitau, *Selected Aspects of Centralized and Decentralized Control Over Campaign Finance,* 23 U. Chi. L. Rev. 620 (1956); Notes, 40 Minn. L. Rev. 156 (1956); 66 Harv. L. Rev. 1259 (1953).

43. American Art Works, Inc. v. Republican State Comm., 177 Okla. 420, 60 P.2d 786 (1936). Generally at common law an unincorporated association, like a political party, cannot maintain an action in its own name, but must sue in the name of all the associates as party plaintiff and all the associates must be made party defendant. See Republican Central Comm. v. Cook County Regular Republican Organization, 348 Ill. App. 189, 108 N.E.2d 524 (1952); Saxer v. Democratic County Comm., 161 Misc. 35, 291 N.Y.S. 18 (Sup. Ct. 1936).

to impose personal liability on him. Personal ratification and authority must be explicitly shown.[44]

Both state and federal courts have so interpreted the law of agency as to erect a legal wall between the candidate and his volunteer campaign committee when it comes to the enforcement of campaign expenditure limitations in the various state corrupt practices statutes, however unrealistically low such limitations may be.[45] This has helped to further weaken the already impotent enforcement of such laws. However, if candidates are to be held accountable for fiscal campaign activities allegedly undertaken on their behalf, then by simple reciprocity[46] they ought to be given some real authority to designate and approve of those who are to collect and disburse campaign funds supposedly obtained to help their cause and candidacy. While this may help fix responsibility and assist in the policing of fiscal campaign activities, it also raises the question of practicality for the already heavily burdened candidate. Moreover, issues of constitutionality arise in requiring a citizen to obtain prior permission from the candidate of his choice before he may financially organize in his support.[47]

II. *Party Organizational Integrity—Legal Efforts and Status*

In the realm of American political analysis the concept of party discipline is not only vague, but it is often employed to denote two rather different qualities. In one context, the term is used to define the extent to which governmental policy-making personnel live up to their parties' platform or principles. Failure of such personal loyalty or commitment would then, at least in principle, entail certain sanctions such as a refusal of electoral assistance by the national party leadership, exclusion from party caucus, appointment to less desirable legislative committee assignments, or inattention to their requests for favors on behalf of constituency or constituents.

The well known failure of the American party system to develop such an arsenal of disciplinary sanctions or to employ its weapons in any but the most hesitant and haphazard manner has disturbed for years those in the American political science profession most

44. Bloom v. Vauclain, 329 Pa. 460, 198 Atl. 78 (1938). See also Wortex Mills, Inc. v. Textile Workers Union, 380 Pa. 3, 109 A.2d 815 (1954).

45. See Mitau, *Selected Aspects of Centralized and Decentralized Control Over Campaign Finance,* 23 U. Chi. L. Rev. 620 (1956).

46. This concept was central in S. 636, a bill introduced in the Senate on Jan. 21, 1955 by Senator Hennings on behalf of himself and Senators Hayden, Green and Gore. See 101 Cong. Rec. 543 (1955).

47. See *Hearings before Senate Subcommittee on Privileges and Elections of Committee on Rules and Administration,* 84th Cong., 1st Sess., ser. 636 at 290 (1955).

concerned with the need for a more genuinely responsible political party system. Many of the severest critics had looked for a long time to the British parties as models for effective policy leadership and instruments of loyal opposition.[48] More recently, expert dissents have been registered, not only as to the likelihood of importing such a system but, perhaps more significantly, as to its desirability within governmental arrangements such as ours. To these experts,[49] federalism, separation of powers, sectionalism, localism, the strength of our interest groups — all of these shaped a socio-political fabric to which our parties adapt and within which they function as cushions and reconcilers with not inconsiderable success.

The concept of "party discipline" has also been used to describe the responsibility of one elected in a party primary to support the party's platform and principles as promulgated by the state convention which, under law, represents the party's supreme spokesman. Legislatures, mainly in the South, have granted to these political party conventions and committees the power to administer an oath of loyalty or support to all those who wish to participate in their party's primaries as voters or candidates.[50] For example, such a party oath was challenged recently in a Texas Repubican primary by a voter who considered himself qualified to participate in the precinct convention, but who was unwilling to sign a required statement declaring:

> "I am a Republican, and desire to participate in the Republican Party activities in the year 1952."[51]

A federal district court held that the voter was ineligible to participate in the convention on the basis of a statutory provision that delegates elected from precinct conventions ". . . must be elected by the voters of the political party holding said convention."[52] This

48. See Ranney, The Doctrine of Responsible Party Government (1954); Schatteschneider, Party Government (1942); Committee on Political Parties of the American Political Science Association, *Towards a More Responsible Two-Party System*, 44 Am. Pol. Sci. Rev. (Supp. 1950).

49. Goodman, *How Much Political Party Centralization Do We Want?*, 13 J. of Pol. 536 (1951); Turner, *Responsible Parties: A Dissent from the Floor*, 45 Am. Pol. Sci. Rev. 143 (1951). See also Ranney and Kendall, Democracy and the American Party System (1956).

50. Sait, American Parties and Elections 378 (2d ed. 1952). In addition to the oath type of closed primaries, some states have employed such "tests" as "past allegience" and "present affiliation." A 1950 study observed some 35 states using various types of closed primaries. See Snider, American State and Local Government 133 (1950).

51. Dickson v. Taylor, 105 F. Supp. 251, 252 (W.D. Tex. 1952).

52. *Id.* at 253. In a case involving States Rights dissenters, it was held that political parties, in order to maintain loyalty and discipline in primary and convention, have "the right to demand that those who seek to hold offices within the party, should make a pledge to support the party nominees." Carter v. Tomlinson, 149 Tex. 7, 13, 227 S.W.2d 795, 798 (1950). See also Fisher v. Taylor, 210 Ark. 380, 196 S.W.2d 217 (1946).

paper is concerned primarily with this second type of "party discipline".

Foremost in the twenty year period here under consideration ranks, of course, the legal opening of the primaries to the Negro voters of the South. The *Classic* case[53] had brought the primaries under federal protection where they constituted an integral aspect of the election machinery and where they effectively controlled the choice of candidates for national office. But the white primaries died hard. They provided "a mechanism ideally designed to permit the maintenance of Southern Democratic solidarity in national politics, with the simultaneous existence of quite warm political conflict among Southern Democratic whites on state questions."[54] Three years after the Court handed down the decision in *Classic,* a Negro exclusion provision by the Texas State Democratic convention was invalidated as constituting a state sanctioned discrimination violative of the fifteenth amendment.[55] The so-called "Boswell" amendment to the Alabama Constitution, passed in 1946, under which only persons who can understand and explain any article of the Federal Constitution to the reasonable satisfaction of one of the various election boards could qualify as electors, was held by a federal court to constitute a denial of equal protection of the laws under the fourteenth amendment.[56] The court pointedly considered as relevant the role played by the State Democratic Executive Committee, an official arm of the State of Alabama, in sponsoring and leading the fight for adoption of the amendment.[57]

"Apparently the white primary, the most effective means of Negro disenfranchisement, is judicially dead", concluded Professor Key, leading authority on the politics of the South; "No alternative subterfuge has met the test of constitutionality . . . [but] poll taxes, literacy tests, and other formal suffrage requirements remained, and their administration became more rigorous after the white primary decisions."[58]

Six Southern states retain the literacy requirements as a rather effective device for keeping the Negro from the polls.[59] This is

53. United States v. Classic, 313 U.S. 299 (1941).
54. Key, American State Politics: An Introduction 22 (1956).
55. Smith v. Allwright, 321 U.S. 649 (1944).
56. Davies v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949).
57. *Id.* at 879. See also Byrd v. Brice, 104 F. Supp. 442 (W.D. La. 1952).
58. Key, Political Parties and Pressure Groups 615 (1952). See also Key, Southern Politics (1949).
59. The following southern states presently have literacy tests: Mississippi, North Carolina, Virginia, Louisiana (certain exemptions are possible), Georgia, South Carolina (ownership of property is an alternative to passing literacy tests). See Council of State Governments, 11 The Book of the States 84 (1956-1957).

accomplished, or at least facilitated, by "educational tests" which provide in addition to certain other conditions that before a citizen may qualify as a voter he must demonstrate an ability to read, write, and understand constitutional provisions; explain obligations and duties of citizenship; or give a "reasonable" interpretation of state or federal constitutional language.[60] With the administration of such provisions left largely in the hands of local registrars and court house politicians, the rate of Negro participation in primary and general election has so far at best advanced slowly and quite unevenly.[61]

The newly enacted "Civil Rights Act of 1957",[62] particularly the creation of an Executive Commission on Civil Rights[63] and the provision for an additional Assistant Attorney General,[64] could potentially have the most profound legal implications for Southern political party organizations. Included in the major provisions of the new federal law are (1) protections afforded voters in general as well as primary elections for federal office,[65] (2) civil and criminal[66] actions by the Attorney General in the name of the United

60. See Ala. Code Ann. tit. 17, § 32 (Supp. 1955) ("read and write any article of the constitution of the United States in the English language"); La. Rev. Stat. § 18:35 (1950) ("applicants for registration shall also be able to read any clause in the constitution of Louisiana or of the United States and give a reasonable interpretation thereof."); Miss. Const. art. 14 § 244. ("Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the constitution of this state and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government."); Ga. Const. art. 2 § 1 para. 4 ("understand and give a reasonable interpretation of any paragraph of the constitution of the United States or of this State that may be read to them by any one of the registrars.").

61. Some recent findings of the Department of Justice, summarized in a letter sent to the Senate by Warren Olney III, Assistant Attorney General of the Criminal Division, were published in the New York Times, August 4, 1957: "The F.B.I. reports followed investigations into incidents in five southern Louisiana parishes in 1956. The Justice Department presented cases based on the reports to a Federal grand jury in Louisiana early this year, but the all-white jury refused to return any indictments . . . many Negroes were disqualified because they had written 'Negro' or 'colored' in a blank on the registration form that said: 'My color is ——.' The Federal agency said the correct answer was supposed to be 'an actual color, such as brown, blue, red or green.' Thus 'white' was a correct answer."

62. Pub. L. No. 85-315, 85th Cong., 1st Sess., § 101 (Sept. 9, 1957).

63. *Id.* at § 101.

64. *Id.* at § 111.

65. *Id.* at § 131. The language of the statute might be so construed as actually applying to *all* elections for *all* types of officials. Senator Javits of New York has taken the position that the act extends the Attorney General's injunctive powers to local elections "as far down as those for dog-catcher." See N.Y. Times, September 24, 1957, p. 6.

66. This was the most controversial section of the legislation. See § 151: "In all cases of criminal contempt arising under the provisions of this act, the accused, upon conviction, shall be punished by fine or imprisonment or

States for preventive relief, including temporary and permanent injunctions,[67] and (3) strengthened juror competence rules aimed at overriding state discrimination against Negroes.[68] While it is impossible to assess the precise effect of this important new legislation at this time, there can be little doubt that it furnishes powerful legal weapons in opening party organizations to all voters, regardless of race, if they were to be applied with determination and consistency.

In addition to primary election pledges and legislation safeguarding party names,[69] American political parties have sought organizational protection in special anti-raiding and anti-fusion statutes. Such laws have been held not to be an arbitrary, discriminatory restraint upon constitutionally safeguarded electoral rights.[70]

Splinter parties in New York, such as the American Labor Party and the American Liberal Party, with their heavy emphasis on issues and ideology have caused the major parties, especially the Democratic Party, considerable difficulties on substantive issues. For example, the 1948 defection of the American Labor Party and its refusal to support the Truman-Barkley ticket played a major role in swinging New York's electoral vote to the G.O.P.[71] The politics of splinter parties in New York City created the somewhat confusing picture of Mayor LaGuardia running under not less than nine different party labels in the course of his career. In the mayoralty campaign of 1941 alone his name appeared on four different tickets.[72]

New York's anti-raiding statute, the so-called Wilson-Pakula law,[73] had as its avowed purpose that before a candidate could be-

both: *Provided, however,* that in case the accused is a natural person the fine to be paid shall not exceed the sum of $1000, nor shall any imprisonment exceed the term of six months; *Provided further, however,* that in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court on conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury which shall conform as near as may be to the practice in other criminal cases."

67. Pub. L. No. 85-315, 85 Cong., 1st Sess. § 151.

68. *Ibid.*

69. Minnesota courts, for example, have likened these safeguarding laws to protection offered owners of trade marks. See Holmes v. Holm, 217 Minn. 264, 14 N.W.2d 312 (1944); O'Brien v. O'Brien, 213 Minn. 140, 6 N.W.2d 47 (1942).

70. See Note, *The Constitutionality of Anti-Fusion and Party-Raiding Statutes,* 47 Colum. L. Rev. 1207, 1213 (1947).

71. See Caldwell, The Government and Administration of New York 42 (1954).

72. See Bone, *Political Parties in New York City,* 40 Am. Pol. Sci. Rev. 272 (1946).

73. N.Y. Election Law § 137 (Supp. 1956).

come the nominee of a political party he had to be either an enrollee of that party at the time of his nomination or at least secure approval of his candidacy by a duly constituted party committee for the political subdivision of the "office for which the nomination is to be made."[74] In *Werbel v. Gernstein*,[75] it was shown that the nominating petitions, allegedly on behalf of a Democratic party organization, were actually ordered and largely signed by and on behalf of members of the American Labor Party. The court concluded that the proceedings by the Democratic party organization cancelling the enrollments of the respondents had been in accordance with law.[76] With the political ideologies of the Democratic and American Labor Party in Kings County "so different as to be irreconcilable," the court found the actions of the respondents as leading " to the inevitable conclusion that there existed a common plan and scheme by the members of the A.L.P. to capture and control the . . . Democratic Party organization."[77]

An alleged invasion into the American Labor Party involving former members of the Democratic Party was involved in *Zuckman v. Donahue*.[78] Here the court rejected any wholesale purge of "paper" members deemed to be out of sympathy with the principles of the party, but upheld the right of a party organization to cancel registration of enrollees where it was "shown to be . . . part of a pre-arranged plan to seize control."[79] The hearings before the County Chairman had based the determination of an enrollee's "sympathy" upon such factors as their replies to a questionnaire, public record indicating their previous party affiliations, the enrollment dates, and subsequent political activities. "No single one of these factors is controlling," the court insisted, "but the combination of all [these] is unmistakably indicative of a lack of sympathy with the purposes of the party, and clearly demonstrates that their enrollments were prompted by ulterior motives."[80] In another case, a

74. *Id.* at § 137(4). On the constitutionality of this statute see Ingersoll v. Heffernan, 188 Misc. 1047, 71 N.Y.S.2d 687 (Sup. Ct. 1947); Ingersoll v. Curran, 188 Misc. 1003, 70 N.Y.S.2d 435 (Sup. Ct. 1947).

75. 191 Misc. 275, 78 N.Y.S.2d 440 (Sup. Ct. 1948).

76. *Ibid.*

77. *Id.* at 278, 78 N.Y.S.2d at 442-43. *But see In re* Gilhuly, 124 Conn. 271, 199 Atl. 436 (1938), where the court held that similar statutory language does not give such official anything but mere ministerial duties and nothing by way of judgment or discretion; and Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515 (1930), where the court held that the power to pass on the sincerity of the candidate's pledge, and to indorse or condemn his past party record is to be exercised solely by the party voters.

78. 274 App. Div. 216, 80 N.Y.S.2d 698 (Sup. Ct. 1948).

79. *Id.* at 217, 86 N.Y.S.2d at 700.

80. *Id.* at 218, 80 N.Y.S.2d at 701.

mere verbal agreement with the principles of the Democratic Party by a former American Liberal Party member was found to be entirely insufficient when hearings before the Democratic county committee established the fact that the respondents' acts belied his words.[81]

On the other hand, while the New York courts have upheld these enrollment cancellations, they have also insisted that the power of expulsion conferred upon such parties or incorporated political associations must not exceed the party constitution or by-laws in their terms, either express or implied. In *Yockel v. German American Bund, Inc.*,[82] the national leadership rested its case for summary expulsion of certain officers of the Bronx unit largely upon their "despicable conduct" in discussing most critically and in complete disregard of the "leadership principle", the activities of the national officials.[83] This type of authoritarian principle was held by the court to be "contrary to the law of the land and the safeguards guaranteed every member by the United States Constitution."[84]

The courts of Arkansas[85] and Louisiana[86] have held that a political party organization may not refuse to certify another qualified candidate or the nominee after the primary election results have been officially determined. On the theory that these party committees have at that point ministerial duties only and no judicial powers whatever, these cases hold that if the nominees are otherwise legally qualified, nothing remains for the political parties to do but to certify their names to the proper state authorities for a place on the general election ballot.[87]

The results of judicial determination of the "White Primary", anti-raiding statutes, and party laws in general seem to demonstrate that the more political party organizations are drawn into the judicial or legislative arena, even in the name of strengthened party discipline, the less they can avoid further deterioration of their previous nearly autonomous common law status.

III. *Presidential Electors and Party Organization*

If a duly authorized state party convention once submits a ticket of presidential electors in the spring of a presidential year, and

81. *In re* Mendelsohn, 197 Misc. 993, 99 N.Y.S.2d 438 (1950). See Note, 34 Cornell L. Q. 430 (1949).
82. 20 N.Y.S.2d 774 (Sup. Ct. 1940).
83. *Id.* at 776-77.
84. *Id.* at 777.
85. Irby v. Barrett, 204 Ark. 682, 163 S.W.2d 512 (1942).
86. Tanner v. Duncan, 10 So.2d 507 (La. App. 1942); Allen v. Republican State Central Comm., 57 So.2d 248 (La. App. 1952).
87. See Tanner v. Duncan, 10 So.2d 507, 509 (La. App. 1942).

political events cause a number of those already certified to declare themselves unable or unwilling, if elected, to cast their vote for the national nominees, may a subsequently called state convention ask the Secretary of State to substitute a slate of "loyalist" electors in place of the dissenters? This issue was raised in *Seay v. Latham,*[88] where a group of fifteen nominees—electors of the Texas Democratic Party selected at that party's May convention—indicated their unwillingness to support the Democratic national ticket of Franklin D. Roosevelt and Harry S. Truman. In effect, the court held that in the absence of statute the state party convention could follow any method of nominating its presidential electors, even if it were to violate its owns customs. The court maintained that after taking cognizance of the course of certain political events, including the proceedings and debates in precinct and district conventions leading up to the September convention at which the majority called for a ticket of "loyalist" electors, the Secretary of State had no alternative but to make the requested substitutions.[89]

Utmost legal "flexibility" to respond promptly to possible demands by States' Rights adherents for separatism is well illustrated by a 1948 Virginia statute.[90] Under its provisions, presidential electors selected by the state conventions of their respective parties are expected to vote for the national presidential ticket unless specifically instructed by a second convention, at least sixty days before the November general election, to vote for different persons.[91] If this should develop, then the national party may still have electors pledged to its nominees shown on the ballot also. Beyond this, other groups, not able to qualify as parties under the code, may also under separate name be given a place on the general election ballot for their respective presidential and vice presidential nominees.[92]

88. 143 Tex. 1, 182 S.W.2d 251 (1944).

89. *Id.* at 9, 182 S.W.2d at 255. Texas courts have so interpreted their election law that presidential electors are not "state officials" in the sense that a governor is a state officer. Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269 (1944). There are also cases to the effect that presidential electors are "state officers." See Walker v. United States, 93 F.2d 383 (8th Cir. 1937). Statutory language "state-wide officers" includes presidential electors: Vaughan v. Boone, 191 Md. 515, 62 A.2d 351 (1948). That presidential electors are "state officers" and thus subject to the provisions of the primary law was an important consideration in the judicial barring of the States' Rights party from Oklahoma ballot in 1948: Lillard v. Cordell, 200 Okla. 577, 198 P.2d 417 (1948). Another approach to the status of presidential electors was noted in a Utah case where the supreme court considered them to be not "public" officers but "party" officers and at that, rather unimportant officials. Markham v. Bennion, 122 Utah 562, 252 P.2d 539 (1953).

90. Va. Code Ann. § 24-290.6 (1950). See Note, 34 Va. L. Rev. 619 (1948).

91. Va. Code Ann. § 24-290.6 (1950).

92. *Id.* at § 24-290.3.

Presidential electors may be nominated by primaries, party committees, or conventions. In nearly half of the states where the so-called "presidential short ballot" is used, their names are not entered on the general election ballot at all.[93] In 1952, the "regular" Democrats in Alabama wished to protect themselves against strong states' rights forces. The State Executive Committee required that those seeking the nomination for the office of presidential elector on the Democratic Party's ticket would have to take an oath of loyalty to support the candidates for president and vice president as nominated by the national convention. Edmund Blair, a candidate for the office of presidential elector, not only struck out the sentence which would so pledge him but also added the following:

> "I will not cast an electoral vote for Harry S. Truman or for any one who advocates the Truman-Humphrey Civil Rights Program."[94]

In a dispute over the validity of the required oath, the Alabama Supreme Court held that while the State Democratic Executive Committee may prescribe the political qualifications of candidates in the Democratic primaries, the office of presidential elector is a federal one and thus governed by the twelfth amendment of the federal Constitution. The presidential electors cannot be so limited by the wording of that amendment in their freedom of choice, despite the prevailing and traditional view that they are to cast their vote in accordance with the wishes of their party.[95]

In *Ray v. Blair*,[96] a divided United States Supreme Court reversed this decision, on the ground that there is nothing constitutionally incompatible between the requirements of the twelfth amendment and a state-authorized party demand that those wishing to seek the nomination for the office of presidential elector should pledge themselves beforehand to support their party's national nominees.[97] The Court stated: "This long continued practical interpretation of the constitutional propriety of an implied or oral pledge [of such a candidate] . . . weighs heavily in considering the constitutionality of such a pledge."[98]

93. Silva, *State Law on the Nomination, Election, and Instruction of Presidential Electors*, 42 Am. Pol. Sci. Rev. 523 (1948). Other such laws enacted since 1948 include: Ark. Acts Art. 67 (1953); Fla. Laws c. 29934 (1955); Me. Rev. Stat. § 4:2 (1949); Nev. Laws § 4767.02 (Supp. 1943-49); N.Y. Laws c. 6 (1956) (for military absentee ballots); Ohio Laws § 3505.10 (1955); Utah Laws c. 37:1 (1947); W.Va. Acts c. 63 § 4 (1955-56).

94. Ray v. Blair, 257 Ala. 151, 153, 57 So.2d 395, 396 (1952).

95. *Ibid.* See also Fisher v. Taylor, 210 Ark 380, 196 S.W.2d 217 (1946).

96. 343 U.S. 214 (1952).

97. *Id.* at 231.

98. *Id.* at 229-30.

In his dissent to *Ray v. Blair*,[99] Justice Jackson expressed a concern that the forcing of presidential electors to pledge support for the national nominees would lead to a "complete suppression of competition between different views within the party"[100] and to the effective exclusion from the primary of all those unwilling to "follow blindly anyone chosen by the national convention."[101] This position seems to underrate the already powerful centrifugal socio-economic forces operative in American politics. Nor does this position seem to acknowledge adequately the mobility of the American electorate—even a Southern electorate—as so dramatically illustrated in the defections from the Democrats to the Republicans in the 1952 and 1956 presidential elections.

In another Alabama case, decided earlier in 1952,[102]that state's highest court had already acknowledged in explicit language that the State Executive Committee of the Democratic party could legally State Executive Committee of the Democratic Party could legally require of all voters the following pledge as a condition precedent to their participation in the primaries:

> "By casting this ballot I do pledge myself to abide by the result of this Primary Election and to aid and support all the nominees thereof in the ensuing General Elections. I do further pledge myself to aid and support the nominees of the national convention of the Democratic Party for President and Vice President of the United States."[103]

The importance of these two cases is not inconsiderable, in that they clearly furnish the legal underpinnings for the efforts of "loyalist" Southern Democrats to combat States' Rights "deviation" and maintain their association with the national party. On the other hand, perhaps equally significant, the *Seay* case[104] well

99. 343 U.S. at 231.
100. *Id.* at 235.
101. *Ibid.*
102. Ray v. Gardner, 257 Ala. 168, 170, 57 So.2d 824, 825 (1952).
103. *Id.* at 170, 57 So.2d at 825. The Alabama Code actually provided "at the bottom of the ballot . . . shall be printed the following, *viz.*: 'By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.'" Ala. Code Ann. tit. 17, § 350 (1940). The State Executive Committee added the following words by resolution adopted January 26, 1952: "I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice President of the United States." While the instant case dealt with the specific issue whether mandamus would lie to require the probate judge to have this amended pledge printed on the ballot (which the court did not sustain on the basis that "he cannot be required to do anything but that which the law requires him to do") the court stressed the "full right, power and authority" possessed by such committee to require this pledge as a condition precedent to participation in the party primary.
104. Seay v. Latham, 143 Tex. 1, 182 S.W.2d 251 (1944).

demonstrated that there is nothing to prevent a severing of such national party links if and when a state convention, called or recalled subsequent to the National Convention, should so decide.

IV. *New Parties and Recognition Proceedings*

The difficulties for third or minor parties to obtain legal recognition are very real and have long been so recognized. That these difficulties can also be overrated may be seen from the fact that in the four presidential elections of 1936, 1940, 1944, and 1948 alone, thirty-three states had places on the general election ballot for one or more minority party. Even in states where the legal barriers stipulated proved procedurally complex, more than fifty per cent made it possible for one or more such parties to obtain a place on the ballot.[105] Where the status of new parties, by legislative design, were made dependent on administrative recognition, judicial determinations of such actions revealed some rather diverse approaches by the courts.

A California statute stipulated, among other things, (1) the exclusion of any political party "which uses or adopts as any part of its party designation the word 'Communist' or any derivative of the word 'Communist' "[106] and (2) the grant to the Secretary of State, with the advice and consent of the Attorney General, the power to determine administratively which political party came within the prohibitions against organizations advocating the forceful overthrow of government.[107] On the theory that the legislature has the power to determine the conditions upon which a political party may participate in the primaries, the California Supreme Court accepted the contention that the public interest requires the exclusion from the ballot of political parties advocating the violent overthrow of government.[108] It rejected, however, as constitutionally invalid, the denial of the primary election machinery to "particularly dangerous citizens" by the device of outlawing a name.[109] This, the court maintained, was special legislation which "has no reasonable relation to the purposes which the legislature had in mind . . . [since] the change of a party name would satisfy the statute without altering the political doctrines at which the legislature has aimed its restrictions."[110] The court added that the administrative discretion

105. See Note, *Legal Obstacles to Minority Party Success,* 57 Yale L. J. 1276 (1948).
106. Cal. Stat. c. 6, § 1 (1940), *repealed,* Cal. Stat. c. 1217, § 3 (1953).
107. Cal. Elections Code § 2540.9 (1953).
108. Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889 (1942).
109. *Id.* at 546, 127 P.2d at 893-94.
110. *Id.* at 550, 127 P.2d at 897-98.

given to the Secretary of State violated notice and hearing requirements and that the judicial review provision was an insufficient safeguard since "the court's action could not possibly come in time to repair the damage which would result from the temporary suspension of the party's right to participate in the election."[111]

A rather different interpretation of a Secretary of State's ministerial powers was noted in connection with a petition by the Progressive Party of 1948 for a place on the ballot under the laws of Oklahoma. The applicable statute required a newly organized political party wishing to have its candidates on the ballot to file petitions including five thousand signatures with the Secretary of State, who in turn would certify such party to the State Election Board.[112] In *Cooper v. Cartwright*,[113] the Secretary of State was shown to have so certified the Progressive Party on the assumption that it was a party in the sense of the statute. A divided court held that "filing of a petition does not create the party,"[114] and that the party "must be in existence when it files the petition."[115] Before any political party can be considered as such, added the court, certain requirements must be met. Without reference to any statutory basis, the court insisted upon such criteria as "effort to organize," "formulation of principles for which that party stands," general party meetings, and delegate conventions adopting party principles upon which the nominees would stand.[116]

The law of Ohio stipulates that before a new political party could be legally recognized and offered a place on the ballot, the

111. *Id.* at 555, 127 P.2d at 900. While upholding as "severable" those provisions of the statute which barred from participation in the primary political parties advocating the violent overthrow of the government, the court considered the following statutory language "which is directly or indirectly affiliated, by any means whatsoever, with . . . any other foreign agency, political party, organization or government . . ." as much too vague, too broad and too far removed from the power of the legislature to limit the constitutional rights of suffrage. The statute in question was subsequently modified in line with this decision and reenacted. See Cal. Stat. c. 1217 § 1.5. See also Independent Progressive Party v. County Clerk, 31 Cal.2d 549, 191 P.2d 6 (1948). The portion of the *Peek* case upholding the power of the legislature to bar certain parties from the polls was prominently cited and relied on in supporting the right of county supervisors to keep civil servants from public employment who were unwilling to sign a loyalty oath or affidavit. Hirschman v. Los Angeles County, 231 P.2d 140 (Dist. Ct. App. 1951), *aff'd*, 39 Cal. 2d 698, 249 P.2d 287 (1952).

112. Okla. Stat. Ann. tit. 26, § 229 (1941).

113. 200 Okla. 456, 195 P.2d 290 (1948).

114. *Id.* at 460, 195 P.2d at 294.

115. *Ibid.*

116. *Ibid.* In a strongly worded dissent, the absence of any statutory basis for such "tests" was pointed out. Maintaining that the two major political parties do not live up to these required criteria either, the dissent argued that the law should apply indiscriminately to old and new parties. 200 Okla. at 462, 195 P.2d at 298 (dissenting opinion).

group must file with the Secretary of State an affidavit to the effect "that it does not advocate, either directly or indirectly, the overthrow of our government."[117] The Wallace Committee was refused such certification by the Secretary of State in 1948, on the grounds that his investigations revealed at least three of the group and some signers of a petition containing forty-five thousand names, to be Communists. His findings were reversed by the Supreme Court of Ohio in *Beck v. Hummel*,[118] where it was acknowledged that while there was no requirement for formal hearing and cross-examination, "there must be in the record of the investigation by the Secretary substantial facts or evidence to overcome the presumption of the good faith or honesty of an affiant whose affidavit fully complies upon its face with the provisions of [law]."[119]

The Progressive Party in Cook County, Illinois, was given legal recognition in the state primary by a rather liberal statutory construction using the device of a declaratory judgment. The Illinois Supreme Court termed such proceedings to have been neither equitable nor one at law, but a proceeding sui generis; that is, "somewhat similar to an election contest."[120] In an attempt to seek statewide recognition, the leaders of the Progressive Party were then faced with the statutory requirement that of twenty-five thousand petitioners, two hundred had to come "from at least each of the 50 counties."[121] They alleged that in as much as fifty-two per cent of the State's registered voters were residents of one county and only thirteen per cent resided in the fifty-three least populated counties, this statute in effect constituted a denial of due process under the fourteenth amendment, violated Articles I, II, and IV, and the seventeenth amendment of the United States Constitution.[122]

Relying strongly on a previous refusal to use the Federal Constitution as a device of forcing Illinois to redistrict more proportionally,[123] a divided United States Supreme Court considered this signature distribution requirement to be "allowable state policy."[124] It would be an unwarrantedly detrimental position, the Court main-

117. Ohio Gen. Code Ann., §§ 4785-100a (1941).
118. 150 Ohio 127, 80 N.E.2d 899 (1948).
119. *Id.* at 139, 80 N.E.2d at 905.
120. Progressive Party v. Flynn, 400 Ill. 102, 106, 79 N.E.2d 516, 518 (1948). See Faherty v. Board of Election Comm'rs, 5 Ill.2d 519, 126 N.E.2d 235 (1955); People *ex rel.* Schlaman v. Electoral Board, 4 Ill.2d 504, 122 N.E. 2d 532 (1955); Progressive Party v. Flynn, 401 Ill. 573, 82 N.E.2d 476 (1948); Recall Bennett Comm. v. Bennett, 196 Ore. 299, 249 P.2d 479 (1952).
121. Ill. Rev. Stat. c. 46 § 10-2 (1947).
122. McDougal v. Green, 335 U.S. 281, 283 (1948).
123. Colegrove v. Green, 328 U.S. 549 (1946). See also South v. Peters, 339 U.S. 276 (1950).
124. McDougal v. Green, 335 U.S. 281 (1948).

tained, "applying such broad constitutional concepts . . . to deny a state the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses."[125]

This judicial unwillingness to intervene on behalf of more equitable legislative representation and force reapportionment has come under severe and significant attack in a recent case from the district court of Hawaii.[126] The court there denied a motion to dismiss for lack of jurisdiction, and sustained a voter's suit seeking relief from the failure of the legislature to reapportion for fifty-five years. Under the provisions of the Organic Act of Hawaii,[127] the territorial legislature has the explicit duty to reapportion "from time to time."[128] "Biased inaction," the Chief Judge wrote, "has had the same result as biased action. It is a denial of the equal protection of the laws."[129] Although the court acknowledged the peculiar territorial status of Hawaii as an element distinguishing it from the *Colegrove* case[130] in which a state of the Union was involved, it based its central argument squarely on the denial of geographic equality. The court reasoned that if the federal government has the power to assure Negroes the right to participate in political party primaries[131] and if it can force state educational systems to desegregate,[132] then the federal government cannot remain silent when *geographic* discriminations deprive citizens of their constitutional rights.[133]

The reasoning of the Hawaiian court was rejected by a majority of a federal district court of Oklahoma late in 1956, in an action by voters against the Governor, state legislature, members of the state supreme court, and others, for a mandatory injunction to force reaportionment as required by the state constitution.[134] The court reaffirmed the view that *Colegrove* was preferable and binding law for the facts involved in the action. The *Dyer* case, upon which the plaintiff relied, was distinguished on the grounds that while the relationship of the territory of Hawaii to the federal government

125. *Id.* at 284. For similar statutes see, *e.g.*, Mass. Ann. Laws c. 53 § 6 (Supp. 1953); Ohio Gen. Code Ann. § 4785 (Supp. 1945).
126. Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D.Hawaii 1956).
127. 31 Stat. 150 (1900), 48 U.S.C.A. § 562 (1952).
128. *Ibid.*
129. 138 F. Supp. at 226.
130. Colegrove v. Green, 328 U.S. 549 (1946).
131. See Terry v. Adams, 345 U.S. 461 (1953).
132. See Brown v. Board of Education, 347 U.S. 483 (1954).
133. 138 F. Supp. at 225-26.
134. Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956), *aff'd per curiam*, 352 U.S. 991 (1957). See also Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956).

distinguished that case from the facts presented in *Colegrove,* no such distinction could be drawn in the instant case. The dissenting opinion argued that although this court could not grant mandamus to "affirmatively remap" the political districts of a state, it could and should declare the existing electoral system invalid as a violation of equal protection of the laws.[135]

Political scientists who have studied and experienced the practical political problems of state reapportionment will find much to applaud in the decision and reasoning of the *Dyer* case. As such, this case cannot easily be charged to represent judicial intervention based either on an unwarranted and exaggerated view of judicial omnipotence, or on a type of judicial lawmaking historically associated with an undesirably subjective application of substantive due process of law. When the court, referring to the constitutional language calling for periodic reapportionment, insisted that the legislators obey the same law that those who vote for them must obey,[136] it cannot easily be charged with having read into the law something that was not there to be read. There are, however, at least three caveats that need to be stressed: (1) this reasoning has direct relevance to those states only which have constitutional provisions explicitly demanding that the legislature is to apportion itself from time to time; (2) forces now opposing the calling and convening of a state constitutional convention in a state urgently in need of reapportionment may be reinforced in their hostility by the fear that such a convention once in session may well wish to incorporate such explicit language for periodic reapportioning, and stipulate appropriate judicial or other sanctions for enforcement; and (3) if the Supreme Court were to uphold the Hawaiian case, by reversing its previous position toward what it terms "political questions," this would then constitute another significant growth in federal power over the already greatly weakened states' rights position at a time when the political climate is most inappropriate and dangerously tense.

An illustration of how the 1948 States' Rights Democrats benefited from a rather narrow interpretation of administrative discretion was noted in a North Carolina case. There the State Board of Elections had adopted certain rules demanding that voters wishing to create a new party must attach to their required petition certificates from county boards of elections, attesting that they are properly registered, and that they had not voted in another exist-

135. 145 F. Supp. at 547.
136. Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 22 (D. Hawaii 1956).

ing party's primary.[137] The States' Rights Party contended tha the petitions were sufficient without complying with the Board' rules for certification of non-participation and sought throug mandamus to have the names of their presidential candidates printe on the official general election ballot. A divided court held that th primary law provisions were inapplicable to "new parties" create by petition, and that the law gave the voter the right to sign suc petitions irrespective of the election board's requirements of non participation in another party's primary. "We are not concerne here," the court reasoned, "with any moral obligations which par ticipation in the primary election . . . may put upon voters. . . ."[13 The court held the rules of the Board of Elections to be "legislatin rather than regulating" and therefore in excess of its statutor authority.[139]

VI. *Summary and Concluding Observations*

However lofty the motivating objectives behind the statutes tha sought to modify and reform political party organizational autonomy, there can now be little doubt about the impressive distance between their present greatly weakened legal status and the immense powers they once possessed as voluntary unincorporated associations under the common law.[140] This trend was shown to have been further accentuated by judicial determinations that (1) affected the powers of party organizations to exclude otherwise qualified voters from participating in the party's primaries merely because of race; (2) permitted considerable variation in state administrative scrutiny of party ideology, principles, and motives, particularly in recognition proceedings involving new parties; (3) called for fairly elaborate procedural safeguards before upholding the decisions rendered by party tribunals on behalf of organizational integrity when it involved cancelation proceedings of party "invaders" and "subversives"; and (4) construed most narrowly the powers of party committees to administer funds and property where authorized by statutes in defraying expenditures related to party primaries.

On the other hand, cases were also noted that pointed rather clearly to a continued judicial emphasis and inclination to rely on the doctrine of "non-intervention" with respect to factional and

137. States' Rights Democratic Party v. State Board of Elections, 229 N.C. 179, 49 S.E.2d 379 (1948).
138. *Id.* at 189, 49 S.E.2d at 386.
139. *Id.* at 187, 49 S.E.2d at 385.
140. On the evolution of the legal status of political party organizations prior to 1938, see Starr, *The Legal Status of American Political Parties,* 34 Am. Pol. Sci. Rev. 439 (1940).

organizational struggles in party conventions and committees. The more remote the locus of party organizational dispute was from the actual nominating process, the less acute seemed to be the likelihood of judicial intervention.

Next to the legal opening of Southern party primaries to Negroes, there was perhaps no more significant judicial determination in the twenty year period here reviewed than that of the *Blair*[141] case, in which the United States Supreme Court upheld the right of a state party organization to pledge candidates for the office of presidential elector to the support of the party's national nominees. The rationale of the *Dyer* case,[142] if adopted by the Supreme Court, could likewise have striking effect on political organization. The import of these developments upon a possibly heightened sense of national party discipline is, however, most difficult to assess. This is due to parallel legislative measures and party rules recently provided in a number of the Southern states which allow the leadership to re-convene state conventions if this be deemed necessary in view of national developments, and which eased also certain statutory requirements facilitating the creation of new, ad hoc, political parties and organizations. The present legal status of presidential electors underscores again most clearly the peculiar characteristic of the American party system as a coalition not only of interest groups but essentially of state based parties as well. On balance, aside from the basic and long range consequences arising out of the direct and preferential primaries, and as a result of the newly enacted Civil Rights Act, judicial determinations of party statutes and disputes have resulted in no new or fundamental legal obstacles to the revitalization and growth of intra-party democracy.

141. See note 96, *supra.*
142. See discussion at note 126 *supra.*

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